

# EJIMEL

Electronic Journal of Islamic  
and Middle Eastern Law



Vol. 3 (2015) pp. 69-81

**At the Foot of the *Sultan*: The Dynamic  
Application of *Shariah* in Malaysia**  
*by Siti Zubaidah Ismail*



University of  
Zurich <sup>UZH</sup>



Vol. 3 (2015)

**Editor-in-Chief**

Prof. Dr. Andrea Büchler, University of Zurich,  
Switzerland

**Editorial Board**

Prof. Dr. Bettina Dennerlein, University of Zurich,  
Switzerland

Prof. Dr. Clark B. Lombardi, Director of Islamic Legal  
Studies, University of Washington School of Law, USA

Prof. Dr. Gianluca Parolin, American University in Cairo,  
Egypt

Prof. Dr. Mathias Rohe, Friedrich-Alexander-Universität  
Erlangen-Nürnberg, Germany

Dr. Eveline Schneider Kayasseh, University of Zurich,  
Switzerland

Dr. Prakash A. Shah, Queen Mary, University of London,  
UK

Dr. Nadjma Yassari, Max Planck Institute for  
Comparative and International Private Law, Hamburg,  
Germany

## EJIMEL Vol. 3 (2015)

### **Published by**

The Center for Islamic and Middle Eastern  
Legal Studies (CIMELS), University of Zurich,  
Zurich, Switzerland

### **Suggested citation style**

Electronic Journal of Islamic and Middle Eastern Law  
(EJIMEL), Vol. 3 (2015), pages, <http://www.ejimel.uzh.ch>

ISSN 1664-5707



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 Unported License (<http://creativecommons.org/licenses/by-nc-nd/3.0/>). You can download an electronic version online. You are free to copy, distribute and transmit the work under the following conditions: Attribution – you must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work); Noncommercial – you may not use this work for commercial purposes; No Derivate Works – you may not alter, transform, or build upon this work.

Cover photo: © PRILL Mediendesign/Fotolia.com

# At the Foot of the *Sultan*: The Dynamic Application of *Shariah* in Malaysia

by Siti Zubaidah Ismail\*

## Table of Contents

I. Introduction .....	69
II. Brief Historical Reflection: From English Law to the Creation of Statutory Islamic Law .....	71
III. Current Administration of Islam and Islamic Laws .....	76
IV. New Issue of <i>Hudud</i> Law .....	80
V. Conclusion .....	81

## Abstract

*Malaysia is known as one of the 'moderate' Muslim countries in the world. Though Islam is enshrined in the Federal Constitution as the religion of the country, Islamic law does not fully govern the country. In fact, Islamic law is part of the national law, which accommodates civil, Islamic and indigenous laws. Civil laws are statutes of general application and civil courts are for all citizens. However, Muslims are also subjected to Islamic family law which governs all matters related to marriage and divorce and also the Shariah criminal offences law, below which, if violated, the offender can be tried in the state's Shariah courts. This article seeks to examine the historical background and the development of Islamic law administration in Malaysia. It focuses on the position of Islamic law within the constitutional framework which sets the separation of power between the state and federal governments. It then examines the institutional power, religious bodies, religious authority and the Shariah courts. Lastly, the paper will reflect on the success, challenges and issues of developing Islamic law after more than fifty years since the nation's independence.*

## I. Introduction

After more than fourteen centuries, Islam has become one of the fastest growing religions in the world. At the turn of the twenty-first century, there were approximately 1.3 billion Muslims worldwide and nearly sixty percent residing in Asia.<sup>1</sup> This has garnered the attention

\* Siti Zubaidah Ismail, PhD, is Senior Lecturer and Head of the Shariah and Law Department, Academy of Islamic Studies, University of Malaya, Malaysia, szubaida@um.edu.my. I would like to thank Ali Mackaben for proofreading the early draft.

<sup>1</sup> MALISE RUTHVEN & AZIM NANJJI, *Historical Atlas of Islam*, Cambridge 2004.

of academics to focus more on the study of Islam, Islamic law and Muslim society within Asia, once considered periphery to the centralised and 'normative' Islam of the Middle East and the Arab world.<sup>2</sup> Scholars writing about Muslim cultures, politics and Islamic law in the new millennium must now take into account the various ways in which Islam manifest itself outside of the popularised orientalist's depictions of desert bedouin and the harems of Persian royalty.

The advent of Islam began during the 7th century C.E. (652 A.H) with the Prophet Muhammad (*sallallahu alayhi wasallam*) who was both a religious and political leader and Islamic law was implemented in all realms of life. In modern times, the degree of religious implementation would be dependent on the nature of the state and its national legal system. Therefore, Muslim countries, that is, those with a predominantly Muslim population, proclaimed either Islam as their state religion or Islamic law as the main source of legislation<sup>3</sup> in order to give legal identity to the state. Currently, according to Glenn, Islamic law has become the world's third major legal tradition.<sup>4</sup> Many scholars like ANDERSON<sup>5</sup> and OTTO<sup>6</sup> reiterate that the national legal system of Muslim-majority countries can be broadly divided into three groups: (i) those that still consider the *Shariah* as the fundamental law and those laws pervade all areas of life (Saudi Arabia is one of the countries that has a strong orientation towards classical *Shariah*); (ii) those that have abandoned the *Shariah* in their legal system but maintain the *waqf* (endowment) management, like Turkey, and (iii) those that have a hybrid system with *Shariah*-based and the civil laws operating in 'parallel'. The third group is the largest group of Muslim-dominated legal systems in the world today.

One of the countries in South East Asia that has become the epicenter for implementing Islamic law is Malaysia. As a member of the Organization of Islamic Conference (OIC), Malaysia enjoys positive global attention for being a reputable non-Arab Muslim country with a modern multi-ethnic society. Praised for embracing Islam in its administrative and political context, Islam is deemed to be fundamental yet moderate, progressive and fast developed. Anthropologist like PELETZ asserts that the Islamization process in Malaysia cannot be compared with "the conventional *areal foci* of Islamic studies – that is the Middle East and North Africa, as Malaysia, a religiously and ethnically diverse Muslim-majority country, in recent decades, has experienced stunning economic transformation and patterns of sustained growth that are probably second to none in the Muslim world."<sup>7</sup> The Islamization process in Malaysia, that is, the intensification of Islamic influence on social, cultural, economic and

<sup>2</sup> MICHAEL J. FEENER & TERENJIT SEVEA, *Islamic Connections: Muslim Societies in South and Southeast Asia*. Singapore 2009.

<sup>3</sup> For example in Pakistan Article 227 of the 1973 constitution of Pakistan requires all laws to be brought in conformity with the injunctions of the *Quran* and *Sunnah*. The new Egyptian constitution of 2014 provides in Article 3 that the principles of Islamic Sharia law shall be THE chief source of legislation. The Saudi Arabia constitution of 1992 provides in Article 1 that "the Quran and Sunna constitute the ultimate and main source of the legal and constitutional rules".

<sup>4</sup> PATRICK GLENN, *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford 2010. For more on Islamic law, see ABDULLAH SAAD ALAREFI, Overview of Islamic Law, *International Criminal Law Review*, Vol. 9 Is. 4 (2009), 707-731.

<sup>5</sup> JAMES N. D. ANDERSON, *Islamic Law in the Modern World*, New York 1959, at 83.

<sup>6</sup> JAN MICHIEL OTTO (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, Leiden 2010.

<sup>7</sup> MICHAEL G. PELETZ, Malaysia's Syariah Judiciary as Global Assemblage: Islamization, Corporatization, and Other Transformations in Context, *Comparative Studies in Society and History* Vol. 55, Is. 3, 2013, 603-633, at 605.



political relations,<sup>8</sup> can take place due to the fact that Islam enjoys the privilege status in the country's legal system. In the area of Islamic banking and finance, education, business and social matters, Malaysia is ahead of her counterparts and has become the flag bearer for incorporating Islam into mainstream society by having services and facilities compliant with *Shariah* or Islamic law. Lately dubbed as a 'hub' for the Islamic finance industry and *halal* businesses, Malaysia is raising Islam to the next level, or as described by MAZNAH MOHAMAD, "[as] being elevated as the *primus inter pares* of all other religions."<sup>9</sup> CHOUDHURY describes Malaysia as a country "where Islamic values and tradition are cherished and valued and simultaneously a highly successful modernizing process is going on".<sup>10</sup> Now, Islam has gone beyond institutional and ceremonial garb as it used to be in the previous decades. As far as the Islamic legal sector is concerned, HAMAYOTSU believes that it is commonly assumed that greater enforcement of Islamic law is the result of growing Islamism in civil society and/or the state.<sup>11</sup> This article seeks to examine the historical background and the development of Islamic law administration in Malaysia. It focuses on the position of Islamic law within the constitutional framework which sets the separation of power between the state and federal governments. It then examines the institutional power, religious bodies, religious authority and the *Shariah* courts. Lastly, the paper will reflect on the success, challenges and potential of developing Islamic law after more than fifty years since the nation's independence. The word *Shariah* that is used throughout this article refers to a code of laws and regulations that administer Islam and Islamic law within the context of Malaysian society. Previously, the words *Hukum Syarak* were used to differentiate between the divinely-inspired rules from the customary dictates.

## II. Brief Historical Reflection: From English Law to the Creation of Statutory Islamic Law

A country's legal system is said to reflect its history, which in part is said to be one of syncretism. In 1938, ROSCOE POUND, an American legal scholar, observed that the history of a system of law is largely a history of borrowing and assimilation of materials from other legal systems from outside.<sup>12</sup> As we shall further see, the historical beginning of a codified Islamic law in the Malay Peninsular was brought about by the British administrators duplicating Islamic law in India, once a British colony (1661-1951).<sup>13</sup> Islam was brought to Southeast Asia and the Malay Archipelago in the 14th century, via trade and business through the port of Malacca, one of the earliest kingdoms in Malaysia. Even though there were many explanations and 'theorizing exercise' regarding the coming of Islam to the Malay world, all agreed that it

<sup>8</sup> JASON P. ABBOTT & SOPHIE GREGORIOS-PIPPAS, *Islamization in Malaysia: Processes and Dynamics*, Contemporary Politics Vol. 16, Is. 2 (2010), 135-151, at 136.

<sup>9</sup> MAZNAH MOHAMAD, *The Evolution of Syariah and postcolonial modernity: embedding Malay authority through statutory law*, available at <<http://www.isa-sociology.org/publ/E-symposium/E-symposium-vol-1-2-2011/EBul-Aug2011-MaznahMohamad.pdf>>, last visited 11 March 2015, 1-19, at 2.

<sup>10</sup> GOLAM WAHED CHOUDHURY, *Islam and the Modern Muslim World*, Kuala Lumpur 1993, at 163.

<sup>11</sup> KIKUE HAMAYOTSU, *Once a Muslim, Always a Muslim: the Politics of State Enforcement of Syariah in Contemporary Malaysia*, South East Asia Research, Vol. 20, No. 3, 2012, 399-421, at 399.

<sup>12</sup> ROSCOE POUND, *The Formative Era of American law*, Boston 1938.

<sup>13</sup> For further reading, ASAF ALI ASGHAR FYZEE, *Muhammadan Law in India, Comparative Study in Society and History* Vol. 5, Is. 4 (1963), 401-415.

was the role of the traders, merchants and the *sufis* that brought the change.<sup>14</sup> Islam had transformed Malay *adat* (customs) and Islamized their traditions, which were previously influenced by Hinduism and Hindu culture between seventh and 14<sup>th</sup> century.<sup>15</sup> Not only that, when talking about the sociological impact, AL-ATTAS viewed that through the efforts of *sufis*, the highly intellectual and rationalistic Islamic religious spirit entered the receptive minds of the Malays of the archipelago and turned them away from all forms of mythology.<sup>16</sup> Eventually, Islamic practices in the realm of business and trade with the Arabs then merged under the administration of the *Sultan* or Malay rulers of Malacca, among others, through the formation of two legal codes, the Canon Laws of Malacca<sup>17</sup> and Maritime Laws,<sup>18</sup> which were compiled during the 13-year reign of Sultan Muzaffar Shah (1446–1459). Another evidence of this Islamization can be traced on the East Coast of the Malaysian Peninsular, where a stone carved with Islamic punishment provisions, dated from the year 1303, was found in the state of Terengganu. This stone, called *Batu Bersurat Terengganu*, is great evidence that the divinely-inspired punishments from the Quran and Hadith pertaining to adultery, fornication, theft and other capital crimes were codified and implemented during the glorious era of the Malay *Sultans* of Terengganu. However, the advent of Islam was put to a halt from the 15<sup>th</sup> century onwards when the Portuguese (1511–1640), and later the Dutch (1641–1785) and British (1786–1956) invaded the country. For over 400 years, the *Tanah Melayu* (Malay States) was colonized by the Portuguese, Dutch and British. During the colonization, trade and industry had increased the migration of workers from India and China and eventually transformed the country from a single-ethnic group into a multi-racial and multi-cultural nation. The colonial powers put little interest in the law-making process and instead concentrated more on administration. The British colonization in the 18<sup>th</sup> and 19<sup>th</sup> centuries changed the country's legal landscape by bringing in its own legal influence onto the Malay land. The Royal Charter of Justice was first introduced in the state of Penang in 1786, followed by the second and the third Charter of Justice applied in Malacca and Singapore which formed the Straits of Settlement. Later, when the British intervened in Perak and Selangor in 1874, Pahang in 1888, and Negeri Sembilan in 1889, the Federated Malay States were established. The British administrator formed treaties with the Malay *Sultans*, among them, through the *Raffles Memorandum to the Sultan of Johore 1873* and the *Pangkor Treaty 1874*; *Sultans* were thus only given autonomy to rule over the sphere of Malay *adat* (custom) and religion.<sup>19</sup> The treaties of

<sup>14</sup> Two theories fit into the variety of explanations regarding the coming of Islam to the Malay world. One, Islam was brought and preached by traders from Arabia, Persia and India. Two, the role of *sufists* from Bengal, India. See SAYYID QUDRATULLAH FATIMI, *Islam comes to Malaysia*, Singapore 1963; GEORGE E MORRISON, *The coming of Islam to the East-Indies*, *Journal of the Malayan Branch of the Royal Asiatic Society*, Vol. XXIV, Is. 1, 1951, 28-37; SYED MUHAMMAD NAQUIB AL-ATTAS, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago*, Kuala Lumpur 1967; SYED FARID ALATAS, *Notes on Various Theories Regarding the Islamization of the Malay Archipelago*, *The Muslim World*, Vol. 75, Is. 3-4, 1985, 162-175.

<sup>15</sup> See for details VIRGINIA MATHESON HOOKER, *A Short History of Malaysia, Linking East and West*. Crows West 2003, at 345.

<sup>16</sup> SYED MUHAMMAD NAQUIB AL-ATTAS, *Some Aspects of Sufism as Understood and Practised among the Malays*, Singapore 1963.

<sup>17</sup> Canon Laws of Malacca (*Hukum Kanun Melaka*) contained matters pertaining to criminal and civil offences, family law, the power of the ruler, rules on proper conduct, particularly with regard to sexual matters, laws regarding slavery and penalties for all offences. See more in LIAW YOCK FANG, *Undang-Undang Melaka*, The Hague 1976.

<sup>18</sup> Maritime Laws of Malacca (*Undang-Undang Laut Melaka*) consisted entirely of rules, regulations, procedures and codes of conduct to be used at sea, obeyed and respected by all. See for details LIAW YOCK FANG, *supra* n. 17.

<sup>19</sup> WAN ARFAH HAMZAH, *A First look at the Malaysian legal system*, Kuala Lumpur 2009, at 158.

protection between Malay rulers and the British administration included a clause prohibiting interference in matters relating to religion and Malay custom from the scope of the advice of the British resident/adviser.

Despite the clause, the British interfered with the administration and application of Islamic law.<sup>20</sup> The legislation passed by the state councils upon the direction of the British adviser included matters concerning Islam, such as the appointment and salaries of *qadi* (judges), the regulation of *zakat* (religious giving or tithes), the administration of *mosques* (Muslim places of worship), the registration of Muslim marriage and divorce, and the punishments imposed for certain offences against the Islamic religion. Thus, according to WAN ARFAH, Islam became just another subject for regulation, in the same manner as contracts, crimes, property and so forth.<sup>21</sup>

While the British involved themselves in the larger sphere of governance as a strategic move to possess more control over the colony, the *Sultan* was left to man those who transgressed the *Hukum Syarak*. Examples of the laws regulating Muslims were the *Order in Council of 1885* requiring Muhammadans (Muslims) to pray in mosques on Fridays, and the *Order in Council No. 1 1894* punishing adultery by Muhammadans (in Perak). Subsequently, the British administration introduced English statutory law and established the civil court system in the early 20<sup>th</sup> century. In most areas of law, the English-inspired codes were introduced. Consequently, whether directly or indirectly, the *Hukum Syarak* or *Shariah* that was neither written nor properly codified was phasing out and relegated to the area of personal law: matrimony, inheritance and religious offences, while the civil courts took over the power and functions of the *qadi* courts. It was to be expected that the *qadi* court was at its infant stage and therefore, not difficult to strategically re-construct to the extent of limiting its power and jurisdiction.

At that time, a pluralistic society had already existed and even Malay people consisted of various tribes with their own *adat*. While the British were keen on imposing English law as statutes for general application, and to get rid of the 'natural justice' practice among the local people: Malay, Chinese, and Hindus, the British could not simply take away the indigenous customs and diverse legal traditions. Therefore, customary laws and *Hukum Syarak* regarding firstly, matrimony, were drafted and enacted in statutory forms. Indian-inspired Islamic law was subsequently introduced and the first being the *Mohammedan Marriage Ordinance 1888* (*Ordinance No. 5, 1888*).

Even though the general principle was clear, that the British should not interfere with the custom of the people, the practical application was difficult. One area of law that created tensions was regarding land regulations. Policies put in place with regard to land registration and ownership – incorporating English rules and regulations to be embedded into the established practice of *adat* – were almost unacceptable. The practice of *adat* and *Hukum Syarak*, however, made the British realise that disputes on land cannot be settled through the civil court using English law, due to the prevailing influence of *Adat Perpatih*<sup>22</sup> and *Adat*

<sup>20</sup> AHMAD IBRAHIM, *The Administration of Islamic Law in Malaysia*, Kuala Lumpur 1996, at 35–6.

<sup>21</sup> WAN ARFAH HAMZAH, *supra* n. 19.

<sup>22</sup> *Adat Perpatih* are customary laws which originated from Minangkabau land in Sumatra, Indonesia. The system practices democracy in electing chiefs and king. Only males are eligible to be elected as leaders for each clan and tribes.



*Temenggong*<sup>23</sup> among the Malay-Muslim community. Tensions also arose as *Adat Perpatih* had many rules which were different from those prescribed by *Hukum Syarak*. Later, in most cases concerning land tenure and inheritance, *adat* prevailed and all cases were mediated and settled through a *Lembaga Adat*, or customary ruling council of the tribe.<sup>24</sup> The British administration who favoured *adat* over religion subsequently enacted *Customary Tenure Enactment 1909* and explicated the permission of registering female ownership and ignored the existing colonial land registration policies.<sup>25</sup> In the 1930s, the *Mohammedan (Offences) Enactment* was introduced in several states, sanctioning more offences in addition to penalties for failure to perform *Jumaat* (Friday congregational) prayer. Then there existed the list of separate enactments, namely *Muhammadian Law and Malay Custom (Determination) Enactment 1930*, the *Muhammadian Marriage and Divorce Registration Enactment 1931*, the *Muhammadian (Offences) Enactment 1938* and the *Council of Religion and Malay Customs Enactment 1949*. That decade also witnessed the strengthening of colonial influence with the *Civil Law Ordinance of 1937* passed by the British ruler, applying the usage of English common law and the principles of equity, thus, marking its formal introduction to the whole Malay land. These laws were modeled on those used in India<sup>26</sup> and supplanted the Malay-Muslim law that had been the foundational law in the Malay states. The civil court system presided by British judges were established. Despite the acknowledgment that *Hukum Syarak* was the local law and that the courts must take judicial notice of it and declare its principles, the judge did not hesitate to apply common law and equity principles to fill the gaps, thus, regarding the Civil Law Enactment 1956, in practice, as the foundational law.<sup>27</sup> R. J. WILKINSON, a Colonial administrator and a historian, states that “there can be no doubt that Muslim law would have ended by becoming the law of Malaysia had not the British law stepped in to check it.”<sup>28</sup>

After the Second World War, a transformation took place where the *Sultans* were losing power to new national ruling elites who were liberal in their perspective. Various enactments for Muslims remained within the purview of state rulers rather than the national federal government. Islam was under the purview of each individual state and hence each of the 13 states in Malaysia enacted their own legislations to govern Muslims and their affairs within the state boundaries. This was the era when the movement for nationalization took place with great vigour, and at the same time, was also the period of “statutory rationalization”.<sup>29</sup> Rationalization exercises were performed to reform the Islamic law and involved an integration of these separate statutes into one major all-encompassing statute, namely *The Administration of Muslim Law Enactment 1952* (State of Selangor). This one enactment, with 172 sections, comprised all matters related to Islam: from *zakat* collection to the management of the *mosques*, from the *Mufti* (head jurist), to court procedures, and from matrimonial matters to *Shariah* offences. This move emphasised decentralization and at the same time, the federal

<sup>23</sup> *Adat Temenggong* came from the same cradle as *Adat Perpatih* but is based on matrilineal tradition.

<sup>24</sup> For further reading, see NOOR AISHA ABDUL RAHMAN, *Colonial Image of Malay Adat Laws: A Critical Appraisal of Studies on Adat Laws in the Malay Peninsula During the Colonial Era and Some Continuities*, Leiden 2006.

<sup>25</sup> MAZNAH MOHAMAD, *supra* n. 9.

<sup>26</sup> Some of these laws include the *Penal Code and Evidence Ordinance 1902*, *Civil Procedure Code 1918*, *Civil Law Enactment 1937*, *Contract Act 1950*, *Civil Law Act 1956*, *Defamation Act 1960*, *Criminal Procedure Code 1935* and *Employment Act 1950*.

<sup>27</sup> *Per James Thorne*, a British judge in *Ramah bte Taat v. Laton bte Malim Sutan* (1927) 6 FMSLR 128.

<sup>28</sup> RICHARD JAMES WILKINSON as quoted in WILLIAM R. ROFF, *Patterns of Islamization in Malaysia, 1890s-1990s: Exemplars, Institutions and Vectors*, *Journal of Islamic Studies* Vol. 9, Is. 2 (1998), 210-228, at 211.

<sup>29</sup> MAZNAH MOHAMAD, *supra* n. 9, at 9.

government would have little power to intervene in matters concerning Islam and the Muslims in each state. As a consequence, matters regarding Islam and Islamic law were affirmatively edged out from federal jurisdiction and put firmly under state jurisdiction under the Malay *Sultans* who were then made the constitutional monarchs. The pluralistic legal system had resulted in not only the distribution of legislative process between the federal and states government, but also between civil and Qadi courts, thus creating the so-called 'dual legal system'.

Although *Hukum Syarak* 'survived' the colonial era which ended in 1957, it firmly remained limited to personal law (family and property) and was then reconstructed to embrace several aspects of offences pertaining to religion and religious duty. Be it as it may, nothing was changed (as far as the law was concerned) when Malaysia achieved independence in 1957. The Federal Constitution was established and Islam was made the federal religion. However, Islamic law was not the federal law, as clearly sanctioned under the *Civil Law Ordinance 1937*. Then the *Civil Law Act 1956* stated that English common law and the principle of equity are the primary legal sources.

The Federal Constitution clearly divides the separation of power between the federal and state, by creating the Federal and State List. The State List under Ninth Schedule elaborates on the power regarding the administration of Islamic law, including:

*Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.*

The last two decades of the twentieth century (1980s and 1990s) witnessed monumental changes where exclusive statutes were passed to replace the all-encompassing 'omnibus' Administration of Muslim Law Act/Enactment. Separate new statutes were enacted: *Islamic Family Law, Shariah Criminal Offences, Criminal Procedure in Shariah Courts, Civil Procedure, Islamic Evidence, and Administration of Islamic Law Enactment*. From 27 sections under the AMLA 1952, the *Shariah Criminal Offences Enactment* doubled to 52 sections. Laws for court procedures – civil and criminal – were also enacted to be used in the *Shariah* court and were modeled on the *Civil Procedure Code and Criminal Procedure Code* used in the civil court. The

*Muslim Wills Enactment* and *Waqf Enactment* were also enacted in Selangor (1999), while the *Zakat and Fitrah Enactment* (1993) and *Fatwa Enactment* (2004) were passed in Sabah.<sup>30</sup>

The *Shariah* court was soon reformed to replace what was once a *qadi* court and the justice system. It was put under the state power, that all Islamic law matters were governed and administered by states' religious council. To strengthen the uniformity of the law and administration between states, the federal government established federal institutions like *Jabatan Kehakiman Syariah Malaysia* or the *Shariah* Judiciary Department (JKSM), established in 1998) and very much earlier, *Jabatan Kemajuan Islam Malaysia* or the Department of Development of Islam (JAKIM), both under the Prime Minister's Department. The *Shariah* Section dealing with the advisory matters on Islam was established under the Attorney General's Chamber. While JAKIM coordinates matters including *zakat*, *waqf*, and *hajj* (pilgrimage to Mecca), JKSM coordinate the *Sharia* courts in the country.<sup>31</sup>

The creation of the federal agencies is in line with the status of Islam as the country's official religion. At the same time, states are given power, by virtue of List 2 of the Federal Constitution, to regulate and administer religious matters. In doing so, the state bodies like Islamic religious councils, religious departments with various divisions under it, *Mufti* office and *Shariah* court were established. Policies regarding Islamic matters are within the states' power, coordinated by several technical and legal committees under JAKIM. The expansion and standardization of Islamic law could not have happened if not for central coordination of the process. To note, there are fourteen states in Malaysia, which is why the standardization and consistency in regards to codified Islamic laws and its administration are needed.

### III. Current Administration of Islam and Islamic Laws

#### 1. Institutions and religious authority

In line with the Federal Constitution, the government established federal agencies in their effort to congregate matters pertaining to Islam and Muslim affairs.<sup>32</sup> As mentioned before, JAKIM was established under the Prime Minister's Department, responsible for the pilgrimage (*hajj*), endowment (*waqaf*), tithes (*zakat*) and so on. The office of *Mufti* exists in every state, thus having 14 *Muftis* altogether, sitting on the states' Fatwa Committee and come under one umbrella of the federal Fatwa Committee with JAKIM as the permanent secretariat. The *Mufti* shall advise the *Sultan* in all matters of *Hukum Syarak* and as far as authorities to be followed, the *Administration of Islamic Law Act 1993 of Federal Territory* provides that in issuing any *fatwa* (legal ruling), the *Mufti* shall ordinarily follow the accepted views of the *Mazhab Syafie*. However, it does not mean that he is absolutely restricted from referring to other Mazhabs like *Hanafi*, *Maliki* or *Hanbali* if the views from other Mazhabs are more suitable in resolving issues

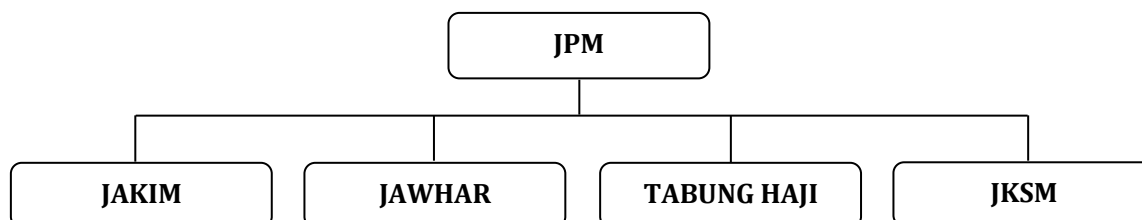
<sup>30</sup> This development has led to the existence of two separate systems of family and property laws: one for Muslims and one for non-Muslims.

<sup>31</sup> For further reading on the experience of the *shariah* court from the early setting, see MICHAEL GREGORY PELETZ, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia*. Princeton 2002.

<sup>32</sup> For other religions, the affairs are manned by Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism. It is an interfaith organization in Malaysia established in 1983 and is composed primarily of five main faiths in the country.

that are in question.<sup>33</sup> The table below further explains the distribution of institutions between states and federal.

**Table 1**  
**FEDERAL-LEVEL ISLAMIC INSTITUTIONS**

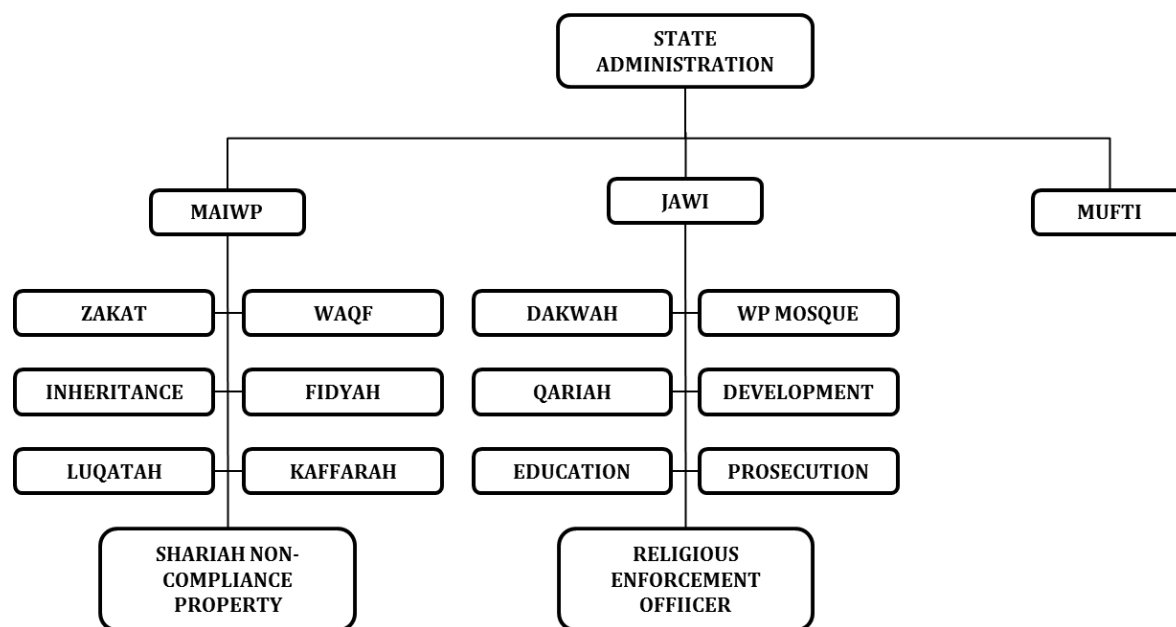


- JAKIM: Malaysia's Department of Development of Islam
- JAWHAR: Department of Waqf, Pilgrimage and Tithe
- TABUNG HAJI: Department of Hajj Fund Management
- JKSM: Department of Shariah Judiciary

<sup>33</sup> Section 39 of the *Administration of Islamic Law Act 1997* of Federal Territory provides that:

- (1) In issuing any *fatwa* under section 31, or certifying any opinion under section 35, the *Mufti* shall ordinarily follow the accepted views (*qaul muktamad*) of the *Mazhab Syafie*.
- (2) If the *Mufti* considers that following the *qaul muktamad* of the *Mazhab Syafie* will lead to a situation which is repugnant to public interests the *Mufti* may follow the *qaul muktamad* of the *Mazhab Hanafi*, *Maliki* or *Hanbali*.
- (3) If the *Mufti* considers that none of the *qaul muktamad* of the four *Mazhabs* may be followed without leading to a situation which is repugnant to the public interest, the *Mufti* may then resolve the question according to his own judgement without being bound by the *qaul muktamad* of any of the four *Mazhabs*.

**TABLE 2**  
**STATE-LEVEL INSTITUTIONS**  
**(FEDERAL TERRITORY MODEL)**



- MAIWP: Majlis Agama Islam Wilayah Persekutuan-Federal Territories Religious Council
- JAWI: Religious Department of Federal Territory
- MUFTI: A scholar or expert appointed by the government and is qualified to issue authoritative legal opinions known as fatwa.
- ZAKAT: tithe
- WAQF: endowment
- DAKWAH: call for Islam
- FIDYAH: fine collected from those who fail to perform fasting due to certain reasons in Ramadhan
- QARIAH: border for mosque
- LUQATAH: property found with unidentified owner
- KAFFARAH: specific fine for specific violation of *ibadah*

## 2. Religious Enforcement and Prosecution Units

Apart from the agencies authorized to administer the Muslim affairs as mentioned above, the religious enforcement unit was also established and given power to enforce offences provided by the Shariah Criminal Offences Enactment. The power and procedures were outlined in the Shariah Criminal Procedure Enactment of each state. Federal Constitution describes that, among the power of the states is to ensure:

*"[the] creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List."*

'Offences against the precepts of Islam' as mentioned above in List 2 (State List) of the Federal Constitution, led to the creation of the *Shariah* Criminal Offences Enactments. There are nearly 42 offences related to belief, institution, decency and miscellaneous offences. The offences that fall under the category of belief, generally related to wrongful activities of deviation. It is



defined as any religious act which deviates from the teaching of Islam and is not recognized by Islamic law according to any *madhhab* (sect). Wrongful worship is worshipping something other than God or reverence for anything in any manner contrary to the Islamic Law. Other offences under this category are teaching or expounding doctrines other than the beliefs and doctrines of Islam among Muslims. Other offences are like insulting, or bringing into contempt the religion of Islam, insulting al-Quran and Hadith, contempt of or defying religious authority or court order, giving opinion contrary to the *fatwa*, publishing religious materials contrary to Islamic law, failure to perform Friday prayer, disrespect to Ramadan, drinking intoxicating drinks, and gambling. Offences concerning decency or what are also popularly known as 'moral offences' draw the most attention. In fact, *Shariah* criminal offences in Malaysia are often characterized by moral cases, particularly the *khalwat* or close proximity<sup>34</sup> due to its frequency of trial in *Shariah* court.

### 3. *Shariah* courts

Since Malaysia has a dual court system, the constitution distributes jurisdiction for both civil and *Shariah* courts. *Shariah* court does not come under the federal court structure, instead it is in a separate hierarchy, or, as put by WU MIN AUN, is 'derivative and dependent'. The power is based on states and administered according to certain jurisdiction and power over persons professing the religion of Islam only. Since 1990s, there is a three-tier court system comprising of Lower Court, High Court and Appeal Court in each state. Legislation as mentioned before pertaining to the administration of the court, procedural and substantive laws were passed by the State's Assembly. Due to this dual-court system, whenever there was a conflict of law and jurisdiction in certain cases and the litigants brought the cases to the High Court, the decision of the Civil High Court would prevail over the previous decision of the *Shariah* court. However, in 1988, an amendment was made to the Federal Constitution and article 121 (1A) of the Federal Constitution was passed declaring that the Civil High Court will have no jurisdiction in respect of any matter within the jurisdiction of the *Shariah* courts. The plain words of Article 121 (1A) mean that the civil courts should not interfere in matters which fall 'within' the jurisdiction of the *Shariah* courts. This is to avoid any occurrence of overstepping the boundary of jurisdiction. Before the amendment was made to the Article 121, the parties unsatisfied with the decision of the *Shariah* court brought their cases to the civil court and it was very unfortunate to evident the decisions made by former being overturned by the latter. So this change was made to prevent litigants from appealing *Shariah* court's decision to the High Court. The problem will not arise if the subject matter in question clearly belongs to one or the other jurisdiction. The entangling problem arises when both have jurisdiction or when the division of power is ambiguous like for example the issue of custody of a child when one of the parents embraced Islam.<sup>35</sup> The problem of conflict is yet to be solved.

<sup>34</sup> SITI ZUBAIDAH ISMAIL, The Legal Dimension of *Khalwat* in Malaysia, *Pertanika Journal of Social Science and Humanities* 2015 (forthcoming).

<sup>35</sup> For example the case of *Myriam v Arif* [1971] 1 LNS 88.

## IV. New Issue of *Hudud* Law

The Federal Constitution allows the State legislative body to create and punish offences by persons professing the religion of Islam against its most foundational precepts. However, the power of the state to enforce Islamic criminal law is limited by the words “except in regard to matters included in the Federal list” or “dealt with by federal law”, for example homicide, theft, rape, kidnapping and so on. Should there be redundancy, inconsistency or conflict with the federal law – for example, with provisions under the Penal Code, which is the prime statute of criminal law– the state law would be *ultra vires* and null and void. Capital punishment, for example life sentence, mandatory death punishment and 20 lashes are those listed under the Federal List of the Federal Constitution. Only the federal law can provide such punishment for serious crimes and consequently, offences related to life and body, namely *qisas and diyat* (retaliation and bloodmoney) involving a death sentence do not fall under the jurisdiction of the *Shariah* court. The Civil High Court is the one that has the power to try homicide cases which has its provision under the Penal Code of Malaysia (Act 574).

Therefore, jurisdiction for *hudud* punishment to the extent of amputation of one hand for theft (*sariqah*) or hands for highway robbery (*hirabah*), and the death sentence for rebellion and treason (*bughah*) would fall under the civil court’s jurisdiction. However, the existing punishments for those offences under the Penal Code are not in accordance with *hudud* principles, as the originality of the Penal Code was modeled from the Indian Penal Code. Understandably, in the context of this country, the *Shariah* criminal law is the law limited to the category of *taazir* (secondary) crime and punishment, and not in its ‘ideal’ form as connoted by the classical *fiqh* (jurisprudence) of *hudud*, *qisas* and *taazir* as mentioned above.

When the state government of Kelantan drafted and passed the *Kelantan Hudud Bill 1993* at the state’s legislative council, containing offences and punishment beyond the state’s jurisdiction, it caused a national uproar. Many claimed that this draft of *hudud* law was designed to suit the political strategy of the Islamic Party (PAS) in their effort to portray a perfect Islamization process in Kelantan. To PAS politicians, Malaysian Islam is not complete without the *hudud* law and this is at once an opportunity for them to challenge the Islamization policy of UMNO, the ruling party which now controls the federal government. Be it as it may, the provisions pertaining to *hudud* with capital punishment cannot simply be implemented because of the limited jurisdiction in sentencing as dictated by the *Shariah Court (Criminal Jurisdiction) Act 1984* (The 1984 Act). This Act clearly spells out that the state’s *Shariah* court cannot impose punishment more than three years imprisonment or fine not more than five thousand *Ringgit* or six lashes. Given the *hudud* punishment concerning a hundred lashes (for adultery), stoning (for a married adulterer), limb amputation (for serious theft) and other capital punishment, the *Shariah* court cannot legitimize it.

## V. Conclusion

After 57 years of independence, and as the historical overview has demonstrated, the Islamic law, or to be precise, *Shariah* law in Malaysia has come a long way to establish the dynamic implementation of codified Islamic law. In the modern context, the actualization of Islamic laws is determined by legislations, validated through a parliamentary process. Therefore, the administration of Islam must stay in the mainstream at the federal level, while the capacity at the state level must be empowered, the administration must be improved and most importantly is that the cooperation between federal and state governments must be enhanced and strengthened to bring the practice of Islam and Islamic law to the highest level possible. Despite the fact that the dual federal and state jurisdictions will remain, it is hoped that bureaucratic hindrances can be relaxed and the strong cooperation between the state and federal governments, can, to some extent, give leeway to enhance the position of Islamic law in the country. With all these 'positive attributes', Malaysia, as put by AZIZ and BAHARUDDIN, is seen by many countries as a model to be emulated.<sup>36</sup>

<sup>36</sup> AZMI AZIZ & SHAMSUL AMRI BAHARUDDIN, *The Religious, the Plural, the Secular and the Modern*, *Inter-Asia Cultural Studies* (2004), 341-356.